Filed 8/20/19 P. v. Talley CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. CLINTON JOHN TALLEY, Defendant and Appellant.	B281571 (Los Angeles County Super. Ct. No. MA065271)

APPEAL from a judgment of the Superior Court of Los Angeles County, Shannon Knight, Judge. Reversed and remanded with directions.

Cynthia Grimm, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, David F. Glassman, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Clinton John Talley of making a criminal threat and stalking, both felonies, and 25 counts of violating a protective order, a misdemeanor. On appeal Talley contends his conviction for making a criminal threat is not supported by substantial evidence, the court erred in admitting evidence of his prior uncharged misconduct and his counsel provided ineffective assistance at trial. He also contends many of the misdemeanor counts are time-barred and remand is necessary to permit the trial court to consider whether to exercise its discretion under the recent amendments to Penal Code sections 667, subdivision (a)(1), and 1385,[1] to dismiss a five-year prior serious felony enhancement imposed as part of Talley's sentence. We reverse the judgment on the ground 16 of Talley's misdemeanor convictions are time-barred, affirm Talley's convictions on all other counts and remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Operative Second Amended Information*

Following the filing of an initial felony complaint on February 15, 2015, an initial information on September 15, 2015 and a first amended information on June 5, 2016, the operative second amended information filed on October 3, 2016 charged Talley with making a criminal threat (count 1) (§ 422), stalking (§ 646.9, subd. (a)) (count 40) and 26 counts of violating a protective order "between April 29, 2014 and August 17, 2015" (§ 166, subd. (c)(1)) (counts 2-27). It specially alleged Talley had suffered a prior serious or violent felony conviction within the meaning of the three strikes law (§§ 667, subds. (b)-(h); 1170.12)

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[1] Statutory references are to this code unless otherwise stated.

and a prior serious felony conviction within the meaning of section 667, subdivision (a). Talley pleaded not guilty and denied the special allegations.

2. *The Evidence at Trial*

Linda Wilson and her housemate, Jamie Kuhn, were the only witnesses to testify at trial. Wilson testified she and Talley began dating in 2010 and they had lived together in her home for a time. The relationship was tumultuous; Talley was violent. Wilson and Kuhn both testified Talley frequently threatened to kill Wilson.

Over Talley's objection the People introduced evidence of several of Talley's prior acts of violence: On December 13, 2013 Talley struck Wilson in the head with a digital tablet. On February 13, 2014 Talley punched Wilson in the eye and attempted to run her over with his car. On March 14, 2014 Talley pointed a handgun at Wilson and pulled the trigger. Wilson and Kuhn heard a clicking sound, but the gun did not fire. On March 17, 2014 Talley slashed all four of Wilson's tires after she refused his demand to drive him to work. On March 19, 2014 Talley physically attacked Wilson and told her, "I'm going to kill you, bitch." Wilson reported each of these incidents to the police. The court ruled the uncharged misconduct was admissible to establish Wilson's fear of Talley and was not unduly prejudicial.

Talley was arrested in April 2014.[2] On April 29, 2014, while Talley was in custody, Wilson obtained a criminal protective order prohibiting Talley from having any personal, electronic or written contact with her. (L.A.S.C. case no. MA062623.) Despite the protective order, Talley continued to

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[2] The jury was not told the reason for Talley's arrest.

contact Wilson while he was incarcerated. By Wilson's estimation Talley called her on the telephone more than 300 times and sent her more than 500 letters. Wilson did not respond to Talley's calls or letters. Talley also wrote letters to Wilson addressed to Wilson's business colleague, her personal physician and to Kuhn, each of whom forwarded the letters to Wilson. Some of Talley's letters to Wilson were more than 20 pages long. Wilson gave some of the letters to law enforcement; retained some, in whole or in part; and discarded the rest. She explained it had become too overwhelming for her to retain all of them. In 2015 Wilson moved from her large home in Acton, where she had owned a dog breeding business for several years, to a small apartment in another city so that Talley could not find her. However, Talley managed to discover her new address and mailed at least one letter to her there.

A number of Talley's letters to Wilson, written and received after Wilson had obtained the protective order, were introduced into evidence. In some of the letters Talley declared his love for Wilson and apologized to her. In others he was menacing and told her she could never escape from him. For example, in one letter he wrote, "[N]othing on this earth will keep us apart" and warned her that, wherever she went, he would be able to find her. In another he asked about his motorcycle and his watch, which were in Wilson's possession, and wrote, "You have a lot riding on your actions out there while I'm in here, especially with you needing to get my motorcycle to a safe place, if you're not going to keep it as promised for me. Don't play with me especially when it's just going to end up in a bad situation for everyone in every way possible." Talley also wrote, "There's two things that would get someone fucked up and that's you and my bike and even

though my friends—my finger [i]s messed up I still can fight pretty good. What outlaw can't?"

In one written communication Talley simply sent Wilson a preprinted form for a statutory will and trust, which Wilson interpreted as a signal from Talley that he intended to kill her and take her house and her dogs. In another, Talley sent Wilson an Alcoholics Anonymous study guide that included a paragraph equating a recovering alcoholic to a gunshot victim. The words in the study guide stated, "Take the gunshot victim for example. He gets shot." In the version Talley sent to Wilson, the printed line was underlined several times in ink; and the letter "s" was added by interlineation to change the word "he" to "she," so that the edited line read, "She gets shot."

In yet another letter Talley warned Wilson, "[T]he day I get out I'm coming after my bike and Rolex, so I'm telling you just like I told your friend Will[,] . . . [r]ight now you're in my good graces. I advise you not to fuck that up. Considering I have nothing to lose from any of this. I've been trying to work all of this out with you. So now here is your chance to set the matter straight and avoid future problems. By the way, I'm still able to fight and beat up some [word redacted by court]." He subsequently wrote, "I'm not going to be locked up for as long as you think due to people sentenced to 50 percent now get[] to do 33 percent of their time, so that puts me out in under a year. If you did something to my bike please tell me so we can work it out as adults. I will be out before the lease[] is up on the ranch. . . ."

Talley also wrote to Kuhn, stating Wilson "is smart enough to know that if anything happens to my Rolex or Harley which are the only things I have left in this world, I will completely come unglued to where I don't care." On the back of that letter

Talley wrote Wilson's birthdate, driver's license number and social security number.

In a February 2015 letter to Wilson, admitted at trial as exhibit 55 and identified by the prosecutor as the basis for the charge of making a criminal threat, Talley wrote, "This is your heads up for saving grace. My Harley[3] needs to be found and returned to me to make me forget about taking action. I just sent out notification regarding a heavy reward for the issue to be dealt with by any means necessary. You are not my friend, family or someone I gave a shit about. My daughter received a copy of your letter as proof of what a piece of shit you are. For future reference don't write me, call me or contact me in any way. I will be putting a restraining order against you. . . . I drop [*sic*] the lawsuit except the $2,400 owed to me for the deposit I put on ranch.[4] If you think I'm going to just sit back and let someone take my bike without repercussions you're fucking crazy. I'll be home soon so enjoy living at my house and breeding my dogs—Trust me when I say all good things must come to an end. As Seymour said when the closet door shut, you're nothing more than a whore that is going to end up pushing a shopping cart in downtown L.A. due to all the people you hurt. Who is going to watch the dogs when Linda gets pulled over with drugs in her car?"

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3 Although the reporter's transcript states, "My heart needs to be found and returned to me," this appears to be a transcription error. Exhibit 55, which Wilson read to the jury and which was admitted into evidence, refers to "my Harley," not "my heart."

4 Wilson testified Talley had filed a frivolous lawsuit while in prison to obtain ownership of her property and her dogs.

Wilson testified she was "a million percent" afraid of Talley. "I haven't slept one night, not once, since all of this has started without waking up screaming every hour." She believed Talley would kill her. As for the letter identified as exhibit 55, Wilson testified she interpreted the line "I just sent out notification regarding a heavy reward for the issue to be dealt with by any means necessary" to mean he would get someone to "kill me for not doing what he wants me to do." According to Wilson, Talley had previously told her he had discovered it would cost him $500 to have her killed and he had, or would, follow through on that plan if she ever crossed him. She understood his language in exhibit 55 about a hefty reward and "deal[ing] with the issue by any means necessary" as referring to his previously threatened murder-for-hire plan.

Talley did not testify. Talley's counsel actively objected to questions during direct examination, but elected not to cross-examine Wilson or Kuhn.

For the misdemeanor counts, the prosecutor introduced additional letters, with postmarked envelopes, to support the charges Talley had violated the protective order by writing to Wilson. The prosecutor informed the jury that this evidence, exhibits 2 through 26, corresponded numerically to misdemeanor counts 2 through 26.[5] The envelopes in exhibits 2 through 20 and 26 contained postmarks between June 2014 and September 2015. There were no dates associated with exhibits 21 through 25, but Wilson testified she received them from Talley after she had obtained the protective order. Each communication, the

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[5] The People voluntarily dismissed count 27 before closing arguments.

prosecutor argued, was a separate violation of section 166, subdivision (c).

4. *The Verdict and Sentence*

The jury found Talley guilty on all charges. In a bifurcated proceeding Talley waived his right to a jury trial on the special allegations and admitted he had suffered a prior felony conviction for making a criminal threat, a serious felony within the meaning of both the three strikes law and section 667, subdivision (a).

The court sentenced Talley to 11 years for making a criminal threat, plus 5,460 consecutive days in county jail for the misdemeanor counts.[6]

DISCUSSION

1. *Substantial Evidence Supports Talley's Conviction for Making a Criminal Threat*

To prove the crime of making a criminal threat under section 422, the prosecution must establish (1) the defendant willfully threatened to commit a crime that will result in death or great bodily injury to another person; (2) the defendant made the threat with the specific intent that the statement be taken as a threat, even if there is no intent of actually carrying it out; (3) the

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[6] The court imposed the upper term of three years for making a criminal threat, doubled under the three strikes law, plus five years for the prior serious felony conviction under section 667, subdivision (a). The court imposed and stayed under section 654 a term of 10 years (the upper term of five years, doubled under the three strikes law) for the stalking count. The court also imposed 364 days in county jail on each of counts 2 through 16 to be served consecutively to count 1 and to each other (for an aggregate consecutive term of 5,460 days on those counts) and 364 days each on counts 17 through 26, to be served concurrently with count 1.

threat was on its face or under the circumstances in which it was made so unequivocal, unconditional, immediate, and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat; (4) the threat actually caused the person threatened to be in sustained fear for his or her own safety or for his or her immediate family's safety; and (5) the threatened person's fear was reasonable under the circumstances. (§ 422; see *In re George T.* (2004) 33 Cal.4th 620, 630; *People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

The surrounding circumstances, both before and after the threat is made, give meaning to the actual words used. (*In re George T., supra,* 33 Cal.4th at p. 637.) Even an ambiguous statement may be a basis for a violation of section 422 if the surrounding circumstances clarify the words used were intended to convey a criminal threat. (*Ibid*. ["the surrounding circumstances may clarify facial ambiguity" in a written communication]; *People v. Butler* (2000) 85 Cal.App.4th 745, 754 ["Thus, it is the circumstances under which the threat is made that give meaning to the actual words used. Even an ambiguous statement may be a basis for a violation of section 422"]; see also *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340 ["the parties' history can also be considered as one of the relevant circumstances" in determining whether the words were intended as a criminal threat].)

Section 422 requires the threat to be "so" unconditional, immediate and specific as to convey a gravity of purpose and an immediate prospect of execution. By including the modifier "so," the Legislature made clear that "'unequivocality, unconditionality, immediacy and specificity are not absolutely mandated,'" but are factors to be considered in determining

whether a threat, in light of the surrounding circumstances, conveys those impressions to the victim. (*People v. Bolin* (1998) 18 Cal.4th 297, 339; accord, *People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1157; see *People v. Wilson* (2010) 186 Cal.App.4th 789, 806 (*Wilson*) [section 422's use of the word unconditional "'"was not meant to prohibit prosecution of all threats involving an 'if' clause, but only to prohibit prosecution based on threats whose conditions precluded them from conveying a gravity of purpose and imminent prospect of execution"'"].)

Talley contends there was insufficient evidence he threatened Wilson with great bodily injury or death in exhibit 55, or that his words were anything more than an innocuous rant conveying his frustration with Wilson's failure to respond to his queries about his motorcycle and his watch. (See *People v. Felix* (2001) 92 Cal.App.4th 905, 913 ["[s]ection 422 was not enacted to punish emotional outbursts, it targets only those who try to instill fear in others"].)[7] Talley likens this case to *In re Ricky T.*

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[7] In considering a claim of insufficient evidence in a criminal case, "'we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] "Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for

(2001) 87 Cal.App.4th 1132, in which a 16-year-old student accidentally hit by a door when his teacher opened it, told the teacher "I'm going to get you" and "kick your ass." (*Id.* at pp. 1137-1138.) In finding insufficient evidence to support the conviction for making a criminal threat, the appellate court observed the statement was ambiguous on its face and no more than a vague threat of retaliation without prospect of execution. (*Id.* at p. 1138.) Critical to the court's opinion was the absence of "any prior history of disagreements, or that either had previously quarreled, or addressed contentious, hostile, or offensive remarks to the other." (*Ibid.*) The court explained, "If surrounding circumstances within the meaning of section 422 can show whether a [criminal] threat was made, absence of circumstances can also show" that one was not made within the meaning of section 422. (*Ibid.*)

Like the purported threats in *Ricky T.*, Talley contends his statement is ambiguous with no intent to convey a threat of bodily injury or death. He referred to a "reward" for the return of his motorcycle, not to convey a murder-for-hire plan. Any ambiguity in that regard, he argues, was clarified by other language in the letter informing Wilson he intended to obtain a

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it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]" [Citation.] A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support'" the jury's verdict.'" (*People v. Penunuri* (2018) 5 Cal.5th 126, 142; accord, *People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

restraining order against her and suggesting she would end up homeless "pushing a shopping cart" on the streets. Whether a threat of financial ruin or something else, plainly this language, Talley argues, was not intended to convey a criminal threat involving great bodily injury or death.

To be sure, on its face Talley's letter could very well be interpreted in the manner Talley suggests. However, the question for the reviewing court is not whether Talley's proffered interpretation was reasonable, but whether substantial evidence supports the jury's finding that the threat was intended to convey, and did reasonably convey, a threat of great bodily injury or death. Unlike the defendant in *Ricky T.,* Talley had a long history of threatening Wilson. Wilson testified Talley had repeatedly told her he had already paid, or intended to pay, someone to have her killed, and in her experience the reward language in exhibit 55 and the accompanying phrases to "deal with the issue by any means necessary" and "all good things must come to an end" were intended to mean exactly that. To Wilson, the meaning of Talley's words was clear: Fail to comply with his demands concerning his motorcycle and watch, and he would have her harmed or killed. The jury, considering Wilson's testimony and all the surrounding circumstances, found Talley's words were intended to communicate, and did communicate, a threat to personally inflict, or to pay someone else to inflict, great bodily injury or death. Substantial evidence supports that finding.

Talley's contention, also based on *In re Ricky T., supra,* 87 Cal.App.4th 1132, that there was insufficient evidence to support the jury's finding the threat conveyed an immediate prospect of execution, also fails. The word "'immediate' [in

section 422] . . . mean[s] that degree of seriousness and imminence which is understood by the victim to be attached to the *future prospect* of the threat being carried out, should the conditions not be met." (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1538.) Here, as discussed, Wilson and Kuhn testified that Talley had threatened Wilson in the past. It makes no difference whether Talley intended to carry out his threat. (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 860.) What matters is that he intended to convey to Wilson an imminent prospect of execution if she did not do what he asked of her. (*Ibid.*; *People v. Mosley* (2007) 155 Cal.App.4th 313, 323.)

Talley wrote to Wilson warning her he would be released in a matter of months. He had also in the past indicated that he had or would hire someone to kill her if she were to obtain a restraining order or otherwise try to escape him. The jury, interpreting Talley's language in exhibit 55 in light of the parties' past relationship, found Talley intended to convey to Wilson a threat that he would harm or kill her if she did not do what he asked of her. Substantial evidence supports the jury's finding the threat conveyed an immediate prospect of execution. (See *People v. Smith* (2009) 178 Cal.App.4th 475, 481 [even though defendant was in Texas, "[a] trier of fact could intelligently conclude[] it was reasonable for S.J. to fear defendant would follow through on the threats"; "this conclusion is based on the totality of the circumstances including the long and escalating history of defendant's violence"]; *Wilson*, *supra,* 186 Cal.App.4th at pp. 815-816 [jury's finding that incarcerated defendant's statement to prison guards that he would "blast" them upon his release from prison in 10 months was sufficiently immediate to constitute a criminal threat; the defendant "effectively made an appointment

to kill [the officer] at his earliest possible opportunity"]; *People v. Gaut* (2002) 95 Cal.App.4th 1425, 1429, 1432 [incarcerated defendant's statement to his girlfriend during jailhouse telephone call that "somebody go[ing to] come see you" was a criminal threat; the surrounding circumstances, including the defendant's violent history with his former girlfriend and the expectation of his early release supported jury's finding].)[8]

2. *The Court Did Not Err in Admitting Evidence of Prior Uncharged Misconduct*

California law prohibits use of evidence of a person's character (a predisposition or propensity to engage in a particular type of behavior), including evidence in the form of specific instances of uncharged misconduct, as a basis for an inference that he or she acted in conformity with that character on a particular occasion. (Evid. Code, § 1101, subd. (a); *People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 823; *People v.*

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[8] Talley also contends the failure to admit his letters in their entirety, particularly exhibit 55, and to exclude those that were incomplete, deprived the jury of the ability to consider the alleged threat in its full context. (See generally Evid. Code, § 356 [where part of a writing is given into evidence by a party, "the whole on the same subject may be inquired into by an adverse party"]; *In re George T., supra,* 33 Cal.4th at p. 637 [fact finder may evaluate threat in context of surrounding circumstances].) However, Talley did not object to the introduction of any of the letters on that ground, let alone exhibit 55 specifically. Accordingly, he has forfeited that contention on appeal. (See Evid. Code, § 353, subd. (a); *People v. Alexander* (2010) 49 Cal.4th 846, 912 [failure to object to introduction of evidence forfeits claim evidence was improperly admitted].) Talley's alternative contention that his counsel was ineffective in failing to object is addressed in section 4, below.

Ewoldt (1994) 7 Cal.4th 380, 393.) However, this rule does not prohibit admission of evidence of uncharged misconduct when relevant to establish some fact other than the person's character or disposition (see Evid. Code, § 1101, subd. (b); *Daveggio and Michaud,* at p. 823; *People v. Leon* (2015) 61 Cal.4th 569, 597-598), provided its probative value is not substantially outweighed by its potential for undue prejudice. (Evid. Code, § 1101, subd. (b); *Leon,* at p. 599; *People v. Kipp* (1998) 18 Cal.4th 349, 369.)

Although Talley contends the evidence of his prior acts of violence toward Wilson was improper character evidence, the trial court correctly ruled that evidence was admissible for the limited purposes of demonstrating Talley's intent and Wilson's actual and reasonable fear of him. (See *People v. Fruits* (2016) 247 Cal.App.4th 188, 203-204 [prior threats against victim were probative of whether "defendant intended to make a threat, whether the charged threat caused Bonnie to be in sustained fear for her safety, and whether such fear was reasonable"; such evidence was offered for the "non-propensity purpose of proving the defendant's intent and the sustained nature of his victim's fear"]; *People v. McCray* (1997) 58 Cal.App.4th 159, 172 [evidence of past violence against the victim was relevant and admissible to show the defendant intended to cause fear, and whether the charged threat caused fear].)

Talley alternatively argues the instances of his uncharged misconduct, which involved actual death threats and violence, were far more inflammatory than the language at issue in exhibit 55 and should have been excluded under Evidence Code

section 352.[9] The trial court balanced the probative value of Talley's prior uncharged conduct with its potential for undue prejudice, limited Wilson's testimony to very recent conduct involving her (and no other victims) and reasonably concluded, on balance, the probative value of that evidence, as limited, far outweighed any potential for undue prejudice. The court also specifically admonished jurors to consider the evidence for a limited purpose and not to conclude from it that Talley was disposed to commit crime. Simply stated, Talley has not demonstrated the court's evidentiary ruling was an abuse of its broad discretion. (See *People v. Lindberg* (2008) 45 Cal.4th 1, 25-26 [no abuse of discretion when evidence of uncharged misconduct had substantial probative value, presentation was relatively brief and trial court provided limiting instruction]; *People v. Davidson* (2013) 221 Cal.App.4th 966, 973 [same].)[10]

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[9] Evidence Code section 352 authorizes a court to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, confusing the issues or misleading the jury. Undue prejudice in this context means "'evidence that tends to evoke an emotional bias against the defendant with very little effect on issues, not evidence that is probative of a defendant's guilt.'" (*People v. Valdez* (2012) 55 Cal.4th 82, 133.) The trial court has broad discretion to admit or exclude evidence under Evidence Code section 352, and its ruling will not be disturbed unless it is arbitrary or irrational. (*People v. Mills* (2010) 48 Cal.4th 158, 195; *People v. Williams* (2008) 43 Cal.4th 584, 634.)

[10] Because the evidence was admissible for nonpropensity purposes, we need not consider the People's argument on appeal that the evidence was also admissible under Evidence Code

3. *The Court Did Not Abuse Its Discretion in Refusing Talley's Requests To Redact/Exclude Items in His Letters*

Talley's counsel requested that aspects of his letters be redacted as unduly prejudicial under Evidence Code section 352. The court granted some of those requests and denied others. Among the evidence the court refused to redact: (1) Talley's statement he had used marijuana and had been "high on drugs" when he committed certain acts; (2) Talley called his mother a "cunt" and said, "I pray daily she [(his mother)] drops a toaster in her bath tub with her in it to overcome the hatred I have for her"; and (3) Talley's statement, "I still can fight pretty good (what outlaw can't?) When I was in county I lit up some [word redacted by court] for disrespecting me"; "By the way I'm still able to fight and beat up some [word redacted by court] when I was in county jail."

Talley has not demonstrated the court's evidentiary rulings compel reversal. Evidence of Talley's continuing ability to fight was directly relevant to Wilson's fear of him and his capacity to cause her great bodily harm, both of which are essential elements of the offense of making a criminal threat. Talley's use of marijuana or that he had been "high on drugs," while not particularly probative, was not unduly prejudicial. And, as to Talley's hatred of his mother and his hope that she die "a horrible death," the prosecutor argued, and the court agreed, that the statements were relevant to Wilson's fear of Talley and not unduly prejudicial. While we might have reached a different conclusion on that question, we cannot say the court's reasoning

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section 1109, subdivision (a), which permits propensity evidence in domestic violence cases.

was an abuse of its discretion, let alone that that ruling, even if error, resulted in a miscarriage of justice compelling reversal. (Evid. Code, § 353.)

Wilson also testified she had interpreted the reward language in exhibit 55 to mean Talley had contacted "his associates in gang prison and streets—that he had gotten word to someone to handle me for not doing—[t]o kill me for not doing what he wants me to do." Talley objected on foundation grounds. The court overruled Talley's objection, explaining Wilson's testimony was relevant to "her perception only." Talley did not request, and the court did not provide, a limiting instruction to that effect.

Talley contends Wilson's testimony referring to "gang associates" improperly led the jury to believe Talley was involved in a prison gang when there was no evidence to support that fact. We agree the trial court would have done better to either sustain Talley's objection on foundation grounds or, at the very least, instruct the jury sua sponte that there was no evidence that Talley was involved in a prison gang. Nonetheless, any error in either regard was harmless. Wilson's single reference to Talley's gang associates was fleeting; the prosecutor did not address it in closing argument or otherwise suggest Talley had any gang ties. Thus, even if the court erred, it is not reasonably probable, based on all the evidence in this record, that Talley would have received a more favorable verdict. (Evid. Code, § 353; *People v. Partida* (2005) 37 Cal.4th 428, 439 [erroneous admission of evidence subject to state law harmless error standard].)

4. *Talley Has Not Demonstrated His Trial Counsel Was Constitutionally Ineffective*

Talley contends his trial counsel committed numerous errors at trial that deprived him of his right to effective

assistance of counsel under the United States and California Constitutions. To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy a "'two-pronged showing: that counsel's performance was deficient, and the defendant was prejudiced, that is, there is a reasonable probability the outcome would have been different were it not for the deficient performance.'" (*People v. Woodruff* (2018) 5 Cal.5th 697, 736; see *Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

a. *Failure to object to partial letters*

At trial Talley's counsel did not object to the admissibility of exhibit 55—the threat letter— on the ground it was incomplete nor did he object to the admission of any of the other letters on that ground. Talley argues his counsel's failure to object was constitutionally deficient, depriving the jury of the full context of Talley's words. "The choice of when to object is inherently a matter of trial tactics . . . ." (*People v. Farnam* (2002) 28 Cal.4th 107, 202; accord, *People v. Carter* (2003) 30 Cal.4th 1166, 1209.) An appellate court will intervene in that decision only when there can be no satisfactory explanation for counsel's omission. (*Carter,* at p. 1209; *People v. Kelly* (1992) 1 Cal.4th 495, 520.)

Talley does not indicate what the omitted portions of any of the letters said or how, if they were available, they would have made a difference in the outcome. This failure is fatal to Talley's argument. It is entirely conceivable counsel knew the omitted portions of the letters contained matters even more detrimental to Talley. In any event, whatever the reason for trial counsel's decision, it is Talley's burden to demonstrate his trial counsel's lack of objection on this ground was both deficient and prejudicial

(*People v. Mickel* (2016) 2 Cal.5th 181, 198), and he has not come close to carrying it.

b. *Failure to cross-examine witnesses*

Talley also contends his counsel was constitutionally deficient in failing to cross-examine Wilson and Kuhn at trial. While the rigor of cross-examination is generally left to counsel's discretion and "rarely implicate[s] inadequacy of representation" (*People v. Bolin, supra,* 18 Cal.4th at p. 334; accord, *People v. Williams* (1997) 16 Cal.4th 153, 217), it is unusual that Talley's counsel conducted no cross-examination at all. As Talley observes, several federal courts ruling on postconviction petitions have found defense counsel's failure to cross-examine a key witness, in whole or in part, constitutionally deficient when that omission enabled critical aspects of the witness's testimony to go unrebutted and untested. (See *Higgins v. Renico* (6th Cir. 2006) 470 F.3d 624, 631, 635-636 [failure to conduct any cross-examination of key witness]; *Steinkuehler v. Meschner* (8th Cir. 1999) 176 F.3d 441, 446 [failure to impeach key witness with prior inconsistent statement]; *Nixon v. Newsome* (11th Cir. 1989) 888 F.2d 112, 115 [failure to impeach witness "sacrificed an opportunity to greatly weaken the star witness's inculpatory testimony"].)

With one distinguishable exception, each of the authorities Talley relies on involved a petition for a writ of habeas corpus, a procedural posture critically different from direct appeal, where our review is necessarily confined to the evidence in the record and we are not privy to counsel's undisclosed motivations. (*People v. Mickel, supra,* 2 Cal.5th at p. 198.) For this reason, defendant's burden in establishing ineffective assistance of counsel is "'difficult to carry on direct appeal,' as a reviewing

court will reverse a conviction based on ineffective assistance of counsel on direct appeal only if there is affirmative evidence that counsel had ""no rational tactical purpose"" for an action or omission." (*Id.* p. 198; accord, *People v. Lucas* (1995) 12 Cal.4th 415, 442-443; see *People v. Jones* (2003) 29 Cal.4th 1229, 1263 ["[a]s the record on appeal does not reveal why defense counsel chose not to object . . . this ineffective assistance of counsel claim would be more appropriately raised in a habeas corpus petition"]; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 [same].)[11]

The record in this case does not demonstrate defense counsel's decision was objectively unreasonable. It is entirely possible that counsel wanted to avoid inviting evidence of Talley's additional prior bad acts or other matters counsel had succeeded in having excluded from trial. Furthermore, Wilson's testimony described her strong fear of Talley; and counsel might have been concerned about reinforcing that point. Although Talley suggests his counsel, at the very least, should have emphasized his more "loving" and apologetic statements, those statements were in evidence for the jury's consideration. Cross-examination of

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[11] The only decision Talley relies on involving a direct appeal is *People v. Callahan* (2004) 124 Cal.App.4th 198, 213-214, which affirmed an order granting a new trial on the ground of ineffective assistance of counsel. In granting the motion, the trial court ruled defense counsel's failure to impeach a key witness was ineffective assistance. In *Callahan*, however, all presumptions favored the court's new trial order. (See *id.* at p. 212.) Here, in contrast, all presumptions favor the propriety of counsel's tactical choices. (See *Strickland v. Washington, supra,* 446 U.S. at p. 688 [there exists a presumption that the alleged deficiency in representation "'might be considered sound trial strategy'" under the circumstances].)

Wilson would have only highlighted the Jeckyll-and-Hyde personality reflected in Talley's letters. Moreover, unlike many of the authorities Talley cites, the record does not disclose any prior inconsistent statements or the existence of impeachable evidence with which Talley's counsel could have confronted Wilson. Simply stated, on this record we cannot say defense counsel's decision, while certainly unusual, was anything other than sound trial strategy.

c. *Defense counsel's closing argument*

Talley's counsel began closing argument by acknowledging, "I don't have an easy job today. . . . [I]t's not the easiest case I've ever had to argue. But at the end of the day you have some duties that you have to do in this case. That you do in every case." Defense counsel then focused the jury on the prosecutor's significant burden of proof and asked the jury whether any of the elements of the criminal threat charge were met: "Was there a threat? The prosecutor has to prove to you the threat was immediate. It was immediately carried out. Has he done that here? Is there an immediate threat to be figured out in this case? Is there specific threat carried out? Was [s]he specifically threatened in this case? There were some statements, but is it a specific threat? And finally, was there an immediate prospect to carrying out the threat? Did he immediately carry out the threat? There is an instruction that says it doesn't matter he was in custody. Could he immediately carry out the threat? Was that reasonable in this case? Did he prove that to you beyond a reasonable doubt? . . . . What I want you to do in this case is simple. Look at the evidence. Fairly. Think about the evidence critically. . . . At the end of the day I believe you'll conclude my client is not guilty of the charges."

Talley contends this closing argument of his counsel was woefully deficient: His counsel failed to answer the questions he posed, neglected to inform the jury that the focus of the inquiry for the criminal threat charge was exhibit 55 and did not address the stalking charge or any of the 25 misdemeanor charges. It is no surprise then, Talley asserts, that the jury returned its verdict in a little more than one hour, finding him guilty on all counts.

The presumption that counsel engaged in a sound trial strategy "appl[ies] with particular force at closing argument" because the decision of how to argue to the jury after the presentation of evidence is inherently tactical. (*People v. Gamache* (2010) 48 Cal.4th 347, 391; accord, *People v. Samayoa* (1997) 15 Cal.4th 795, 856 ["'the decision of how to argue to the jury after the presentation of evidence is inherently tactical' [citation], and there is a 'strong presumption' that counsel's actions were sound trial strategy under the circumstances prevailing at trial"].) Viewed in this light, we cannot say counsel's argument was constitutionally deficient. Although the argument was brief, counsel's strategy was evident: to focus the jury on the enormity of the People's burden of proof. Without conceding any charges, he directed the jury to the weakest part of the People's case, the offense of making a criminal threat, and argued the People had not carried their burden.

Defense counsel's acknowledgment at the beginning of his closing argument that he did not have an easy task was not tantamount to a concession of Talley's guilt or otherwise prejudicial. To the contrary, in context counsel's statement suggests an effort to build credibility with the jury in a case involving substantial inculpatory evidence and a sympathetic victim. (See *People v. Fairbank* (1997) 16 Cal.4th 1223, 1251

["Closing argument is as much an art as a science . . . . Counsel must establish as much credibility with the jurors as possible if his effort to persuade them is to succeed"]; *People v. Scott* (1997) 15 Cal.4th 1188, 1224-1225 [same].) Defense counsel told the jury he was confident that the jury, when it reviewed the evidence in conjunction with the questions counsel posed, would find his client not guilty "on all charges."

Talley's counsel's failure to remind the jury that exhibit 55 was the focus of count 1's charge of making a criminal threat was also not objectively unreasonable. The prosecutor had already identified exhibit 55 as the basis for that count in his initial closing argument.[12] The failure to provide a further reminder was not necessary, let alone constitutionally deficient.[13]

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[12] In his initial closing argument, and in conformity with the court's instruction to counsel that either an election or unanimity instruction was necessary, the prosecutor told the jury that the threat the jury should consider is "what was in People's 55" and explained that unlike the stalking charge, for "the criminal threats we're just looking at one." He reiterated that point again in rebuttal.

[13] Talley's related contention reversal is required because the court failed to provide an unanimity instruction also fails. (See *People v. Brown* (2017) 11 Cal.App.5th 332, 341 [unanimity instruction not required when prosecutor makes a specific election tying each count to specific evidence—"typically [the election is made] in opening statement and/or closing argument"]; *People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292 [unanimity instruction was not required for the section 422 offense of making criminal threats when record showed "the prosecutor clearly informed the jury in opening and closing argument that the People were electing the threat set forth in Hall's testimony as the basis of the criminal threats offense"].)

Finally, Talley asserts his counsel was deficient when he told the jury it would receive an instruction that Talley's incarceration at the time he made the alleged criminal threat "did not matter" for the criminal threat count. In fact, Talley observes, while the jury was instructed in accordance with CALCRIM No. 1301 that a person who makes a threat while in jail or prison may still be guilty of stalking, CALCRIM No. 1300, which instructed the jury on criminal threats, did not contain that clarification. Nonetheless, defense counsel was not deficient for stating a point that is correct under the law. As discussed, Talley's incarceration at the time the criminal threat was made did not preclude his culpability for making a criminal threat, particularly when the undisputed evidence established that Talley had warned Wilson his incarceration would be relatively brief. (See *Wilson, supra,* 186 Cal.App.4th at p. 808.) Talley concedes the jury was properly instructed as to the charge of making a criminal threat. He has not demonstrated his counsel's statement was constitutionally ineffective.

5. *Multiple Misdemeanor Counts* (*Counts 5-14 and 21-26*) *Are Time-barred*

To avoid the bar of the statute of limitations, the prosecution of the misdemeanor offenses like those charged in counts 2 through 26 "shall be commenced within one year after commission of the offense." (§ 802, subd. (a).) A prosecution is commenced when (a) an indictment or information is filed; (b) a complaint is filed charging a misdemeanor or infraction; (c) the defendant is arraigned on a felony complaint; or (d) an arrest warrant or bench warrant is issued that describes the defendant with the same degree of particularity required for an indictment, information or complaint. (§ 804, subds. (a)-(d).) "No time during which prosecution of the same person for the same conduct is

pending in a court of this state is a part of a limitation of time prescribed in this chapter." (§ 803, subd. (b).) If the prosecution is not timely commenced and not otherwise tolled, the charge is time-barred.

Asserting that prosecution of the misdemeanor offenses commenced on September 23, 2015 when the initial information was filed charging him in counts 2 through 26 with violating the April 29, 2014 protective order, Talley contends those offenses that were committed before September 23, 2014 are time-barred and his convictions on those counts are void. Since the undisputed evidence in the record (the postmarks on the envelopes) demonstrated that counts 2 through 14 and 26 were committed before September 23, 2014,[14] he asserts those counts are time-barred. In addition, he contends counts 21 through 25 are similarly time-barred because the record is devoid of evidence from which it can be determined when those letters were sent.

a. *Governing law*

When the charging document on its face reveals alleged offenses are time-barred, the conviction is void (unless the statute has been tolled) and may be attacked at any time. (*People v. Williams* (1999) 21 Cal.4th 335, 341.) If the statutory bar is not apparent from the face of the charging document, timeliness is a

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[14] The undisputed evidence (the postmarks on the envelopes) established the dates each of the violations for counts 2 through 4 and 26 occurred: Count 2, June 6, 2014; count 3, June 13, 2014; count 4, June 13, 2014; count 5, June 13, 2014; count 6, June 16, 2014; count 7, June 16, 2014; count 8, June 19, 2014; count 9, June 23, 2014; count 10, June 30, 2014; count 11, July 21, 2014; count 12, August 25, 2014; count 13, September 11, 2014; count 14, September 12, 2014; and count 26, September 19, 2014.

question of proof. (*Id.* at p. 345 ["'[w]hen the pleading is facially sufficient, the issue of the statute of limitations is solely an evidentiary one'"], quoting *People v. Padfield* (1982) 136 Cal.App.3d 218, 226.) It is the People's burden to plead and prove by a preponderance of the evidence that the prosecution is timely. (*People v. Zamora* (1976) 18 Cal.3d 538, 563, fn. 25; *People v. Angel* (1999) 70 Cal.App.4th 1141, 1147.)

The operative information in this case alleged a date range that included both timely and time-barred charges. Such an information is not facially deficient. (See *People v. Smith* (2002) 98 Cal.App.4th 1182, 1191 [when date range alleged in information encompasses both timely and time-barred claims, reviewing court will determine if action is time-barred based on evidence in record].) The question on appeal, therefore, is simply whether there is substantial evidence in the record to demonstrate the charges were timely filed. (See *People v. Williams*, *supra*, 21 Cal.4th at p. 345; *People v. Simmons* (2012) 210 Cal.App.4th 778, 789.)[15]

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[15] Talley did not forfeit his statute of limitations argument by failing to raise it at trial, notwithstanding the contrary suggestion in several court of appeal decisions. (See, e.g., *People v. Ortega* (2013) 218 Cal.App.4th 1418, 1428 ["[i]f, on the other hand, the charging document does allege that the action is timely, any objection to the sufficiency of the evidence to prove timeliness must be raised in the trial court in the first instance—typically, by requesting a jury instruction on the subject"]; *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1439 ["[i]f the People plead facts to avoid the bar of the statute of limitations, and the defendant fails to put the People to their proof in the trial court, then the defendant forfeits the statute of limitations issue and cannot raise it for the first time on appeal"].) While the

b. *Counts 5 through 14 and 26 are time-barred; counts 2 through 4 are not*

The second amended information charged Talley in count 2 through 26 of violating a protective order between April 29, 2014 and August 17, 2015. Talley asserts, and the People do not dispute, the prosecution of counts 5 through 14 and 26 commenced with the filing of the original information on September 23, 2015. Because the undisputed evidence established those offenses were committed more than one year before any prosecution had been initiated, and the People do not contend the limitations period was tolled for those offenses, they are time-barred as a matter of law. Counts 2, 3 and 4, in contrast, were pending as of February 9, 2015 when the criminal complaint was filed charging those counts.[16] Accordingly, for

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defendant may forfeit the right to litigate specific factual questions concerning the limitations period by not raising them at trial (*People v. Williams, supra,* 21 Cal.4th at p. 344), it remains the People's burden to prove an action is timely (see *People v. Crosby* (1962) 58 Cal.2d 713, 725); and a plaintiff does not forfeit arguments relating to sufficiency of the evidence by failing to object in the trial court. (See *People v. Butler* (2003) 31 Cal.4th 1119, 1126 & fn. 4 [sufficiency of evidence is an exception to forfeiture doctrine; defendant does not forfeit challenge to sufficiency of evidence by failing to object at trial].)

[16] The February 2015 complaint charged Talley with making a criminal threat and three counts of contempt under section 166, subdivision (a)(4), for violating a restraining order in Los Angeles Superior Court case no. MA062623. Count 2 charged Talley with violating the restraining order between September 30, 2014 and October 13, 2014; count 3 charged him with disobeying the same restraining order on October 14, 2014; and count 4 charged him with disobeying the same restraining order on January 7, 2015.

those counts the pendency of the February 9, 2015 complaint tolled the statute of limitations. (§ 803, subd. (b).)

Talley insists the complaint did not toll the limitations period because it charged in counts 2 through 4 violations of the protective order under a different subdivision of section 166—subdivision (a)(4), rather than subdivision (c)(1). Talley misapprehends section 803, subdivision (b), which provides for tolling during the time a pending complaint or information was on file charging the "same conduct," whether or not the conduct was charged under the same statute. As the Law Revision Commission explained, the antecedent to section 803, subdivision (b), former section 802.5, had provided that "'no time during which a criminal action is pending is a part of any limitation of the time for recommencing that criminal action in the event of a prior dismissal of that action . . . .' That requirement of the same "criminal action" was "too narrow" in that it failed to account for dismissals of charges that were simply the result of "'a substantial variation between the previous allegations and the proof.'" (*People v. Whitfield* (1993) 19 Cal.App.4th 1652, 1659, fn. 8, quoting Law Revision Com. com. to § 803, subd. (b).) Section 803, subdivision (b), cured that problem by substituting "same conduct" for "same criminal action," thereby granting the prosecutor "'some flexibility'" in dismissing and recharging offenses while also "'affording the defendant fair protection against an enlargement of the charges after running of the statute.'" (*Whitfield,* at p. 1659; accord, *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1441; cf. *People v. Terry* (2005) 127 Cal.App.4th 750, 757 [additional lewd acts not

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Those dates fall within the date range charged in counts 2 through 4 of the operative second amended information.

charged in prior information charging lewd conduct were not tolled under section 803, subdivision (b); additional acts were not "same conduct" originally charged even though charged under same statute].)

Both counts 2 through 4 in the complaint and counts 2 through 4 in the information charged Talley with the same conduct—violating the restraining order issued in Los Angeles Superior Court case no. MA062623.[17] Accordingly, while those charges were pending in the February 2015 complaint, the limitations period was tolled; and it remained tolled, as the complaint remained on file until superseded by the September 15, 2015 amended complaint charging the same conduct and later by the September 23, 2015 original information also charging the same conduct in counts 2 through 4. Thus, for counts 2, 3 and 4, the record indisputably demonstrates those charges are not time-barred.

c. *Counts 21-25 are time-barred*

As to counts 21 through 25, which were based on undated communications from Talley to Wilson, the People proved only that the offenses occurred at some time after April 29, 2014 when Wilson obtained the protective order. Because the prosecutor did

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[17] The difference between subdivision (a)(4) and subdivision (c)(1) is that the former encompasses violation of any "court order" (see § 166, subd. (a)(4) [prohibiting willful disobedience of "the terms as written of any process or court order"]), while the latter, more specific subdivision, may be charged when the order at issue is a protective order. (See § 166, subd. (c)(1) ["[n]otwithstanding paragraph (4) of subdivision (a), a willful and knowing violation of a protective order or stay-away court order . . . shall constitute contempt of court, a misdemeanor"].)

not prove those offenses were committed after September 23, 2014, those convictions are fatally defective. (See *People v. Simmons, supra,* 210 Cal.App.4th at p. 789 ["[D]efendant was alleged to have violated section 288.2, subdivision (a), between February 9, 1999, and February 9, 2000. The People presented substantial evidence that the crime occurred sometime during this time period, but not precisely when. Because the crime could have been committed as early as February 9, 1999," the three-year limitations period expired]; *People v. Angel, supra,* 70 Cal.App.4th at p. 1147 ["[s]ince we cannot tell whether the jury convicted appellant of offenses not shown to have been committed within the period of limitations, the convictions are fatally defective unless the statute of limitations was tolled"].)

In sum, we strike counts 5 through 14 and 21 through 26 as time-barred. Because the court imposed consecutive sentences on some counts and concurrent sentences for others, a remand for resentencing is necessary.

6. *On Remand the Trial Court Will Have the Opportunity To Exercise Its New Sentencing Discretion*

In supplemental briefing to this court Talley urges we remand to permit the trial court to exercise its discretion under recent amendments to sections 667, subdivision (a)(1), and 1385, subdivision (b), to allow the trial court to strike or dismiss the five-year prior serious felony enhancement it imposed. In their supplemental respondent's brief the People argue remand is unwarranted because the trial court clearly indicated it would not have dismissed the serious felony enhancement even if it had discretion to do so. Even were we otherwise inclined to agree with the People's expansive interpretation of the court's remarks, because a remand for resentencing is necessary in light of our reversal of 16 of the 25 misdemeanor counts, the court at

resentencing should also consider whether to exercise its discretion with respect to the five-year enhancement.

DISPOSITION

We reverse the judgment, strike counts 5 through 14 and 21 through 26 as time-barred and remand for resentencing. Talley's convictions on count 1 (making a criminal threat), counts 2, 3, 4, 15, 16, 17, 18, 19, 20 (violating a protective order) and count 40 (stalking) are affirmed. At the sentencing hearing on the remaining counts, the court shall also consider, upon request, whether to exercise its discretion to strike or dismiss the five-year serious felony enhancement imposed under section 667, subdivision (a).

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.